

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

In Re:	)	Case No. 95-30796
	)	Chapter 7
KOLORTEX CORPORATION,	)	
	)	
Debtor.	)	
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**ORDER**

This matter comes before the Court on the Motion for Order Allowing Amendment of Claim filed on March 6, 1996 by Hoechst Celanese ("Hoechst"), a creditor in the case. A response to the Motion was filed by the Chapter 7 Trustee on March 11, 1996 and a hearing was held on the matter in Charlotte, North Carolina on April 18, 1996. Based on that hearing and its own records, the Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. The Debtor filed a voluntary Chapter 11 petition under the Bankruptcy Code on June 1, 1995. Subsequently, the Court converted the case to Chapter 7 on September 7, 1995 and appointed a trustee.

2. The schedules, filed as part of the Debtor's original Chapter 11 petition, indicated that Hoechst was a general unsecured creditor of the Debtor, holding an undisputed claim of \$83,911.85.

3. At the April 18 hearing, both parties agreed that Hoechst's general unsecured claim is actually for \$77,927.68.

4. Keiltex Corporation was a guarantor of the debt to Hoechst. Hans Keilhack ("Keilhack") was the President of both Keiltex and the Debtor, which, in addition to having common

officers and shareholders, operated out of the same business premises. On June 5, 1995, Hoechst, through its attorney, sent a demand letter to Keilhack indicating that the Debtor owed Hoechst a debt of \$77,927.68. The Debtor was a Debtor-in-Possession at the time of the letter and had the rights and obligations of a trustee under 11 U.S.C. § 1107. As the principal officer of the Debtor, Keilhack was charged with operating the Debtor in accordance with those obligations. To avoid violating the automatic stay of Code section 362, Hoechst made it clear that the demand was based on the guaranty provided by Keiltex, which was not in bankruptcy at the time.

5. On June 21, 1995, Hoechst filed and served a complaint on Keilhack, indicating, once again, that the Debtor owed Hoechst \$77,927.68 and demanding payment from Keiltex as guarantor of the debt.

6. The claims bar date in the Debtor's Chapter 7 case was January 16, 1996. Hoechst did have notice of the case, but did not file a formal claim until after the bar date. Hoechst's formal proof of claim was filed on February 22, 1996 and alleged that Hoechst had a prepetition, nonpriority unsecured claim in the amount of \$77,927.68.

7. In response, the Chapter 7 Trustee filed an objection to Hoechst's claim because it was filed late. Further, the Trustee requested that the Court treat Hoechst's claim as tardy and subordinate it as provided for in Section 726 of the Bankruptcy Code.

8. In response to the Trustee's Objection, Hoechst filed a motion to have its formal claim treated as an amendment to its informal claim, which Hoechst alleges was made before the claims bar date in the form of the demand letter and complaint sent to Keilhack. The Trustee responded to Hoechst's motion and a hearing was held on the matter.

### CONCLUSIONS OF LAW

1. Section 726 of the Bankruptcy Code provides that all nonpriority, unsecured claims, which are tardily filed by a creditor who has proper notice of the bankruptcy, will be subordinated to (1) priority unsecured claims, (2) timely filed general unsecured claims, and (3) general unsecured claims that are filed late because the creditor had no notice of the bankruptcy. 11 U.S.C. § 726.

2. It is undisputed that Hoechst did have proper notice of the Debtor's bankruptcy and did not file a formal proof of claim evidencing its general unsecured debt in a timely fashion. Therefore, absent the existence of any other factors in this case, Hoechst's claim would be subordinated under section 726 of the Code.

3. However, in keeping with the underlying goal of the Bankruptcy Code to treat similarly situated creditors in a similar fashion, a growing trend has developed in case law that recognizes a creditor's informal claim, if timely made, as a proof of claim for purposes of section 501. In re Southwest Equipment Rental,

Inc., 193 B.R. 276 (E.D. Tenn. 1996), In re Honda, 106 B.R. 204 (D. Haw. 1989). Further, those cases have treated the creditors' subsequent late filed formal proofs of claim as amendments to their informal proofs of claim, and, as such, have found that the claims are not subject to subordination under section 726.

4. In cases that have begun this trend, courts have looked at several elements when determining whether a certain act by a creditor rises to the level of an informal claim. A typical list of elements, which courts have noted as important, is found in In re Southwest Equipment Rental, Inc., 193 B.R. 276 (E.D. Tenn. 1996). In that case, the District Court adopted the five part test set out in In re McCoy Management Serv., Inc., 44 B.R. 215, 217 (Bankr. W. D. Ky. 1984), which lists five elements that must be met before a creditor's act will be recognized as an informal claim. Those elements include; "[o]ne, [the claim] must be in writing; two, it must contain a demand by the creditor on the debtor's estate; three, it must express an intent to hold the debtor liable for the debt; four, it must be filed with the Bankruptcy Court; and five, the facts of the case must make allowance equitable." In re Southwest Equipment Rental, Inc. at 281-282.

Several of the elements enumerated in Southwest Equipment Rental, Inc. are met in the current case. First, Hoechst's letter and complaint to Keilhack satisfies the writing requirement of element one. Second, although the letter made an explicit demand on Keiltex as the guarantor of the Debtor's debt to Hoechst, it was sent to Keilhack, the President of both the Keiltex and the Debtor.

Therefore, it is clear that the principal officer of the Debtor, which was a Debtor-in-Possession at the time was aware of Hoechst's debt and its demand for payment. Likewise, the letter and complaint indirectly indicated Hoechst's intent to hold the Debtor liable. Finally, recognizing Hoechst's formal proof of claim as merely an amendment to its timely "filed" informal claim would be equitable in the current case. There is no argument that Hoechst is a legitimate general unsecured creditor of the Debtor. Further, the debt was originally listed on the Debtor's Chapter 11 schedules and no disbursement to the general unsecureds has taken place. As a result, the claim should not be unexpected by other creditors and no creditor will be required to refund any funds already received. Although all of the elements of an informal claim as set out in Southwest Equipment Rental, Inc. were not met fully by the Debtor in the current case, the majority of them were substantially satisfied.

5. It is true that, although a majority of the characteristics of an informal claim, as they have been developed in recent case law from other circuits, do exist in the current case, not all of them are present. However, the Fourth Circuit has not adopted this test in any opinion as of yet. The standard which this Circuit has adopted with regard to the filing of informal claims is arguably a much less stringent standard than the five part test set out in Southwest Equipment Rental, Inc.. In Fyne v. Atlas Supply, 245 F.2d 107 (4th Cir. 1957), which is admittedly an Act case, the Fourth Circuit indicated that the Court favors "the greatest

liberality in the allowance of the filing of amended proofs of claim if there is anything in the record to support it." Id. at 109 (quoting In re Quality Publications, Inc., 12 F. Supp. 651, 652 (S.D.N.Y. 1935). No Fourth Circuit decision has indicated a departure from the "greatest liberality" standard, with regard to informal claims serving as the basis for amended proofs of claim. In fact, this language was cited by the Circuit Court as controlling law in its unpublished decision, Paul, Trustee and Maryland Oil Company, Inc. v. Calvert Oil Company, No. 89-2320 (1989), which was considered under the Code.

6. While Hoechst may not have succeeded in fully meeting every element under the stricter Southwest Equipment Rental, Inc. five part test, there is enough in the record to recognize its previous actions as a timely informal claim and to allow its formal claim as an amended claim under the Fourth Circuit's "greatest liberality" standard. In making this decision, the court notes that little or no prejudice to any other party will result from the recognition of Hoechst's claim as being filed timely. The claim was listed in the Debtor's Chapter 11 schedules and no distribution has yet been made to the class of general unsecured creditors. If any prejudice can be found in the situation it is only in the added expense which the Chapter 7 Trustee incurred in preparing an objection to Hoechst's claim and appearing in court to prosecute that objection. As a result, Hoechst will be required to reimburse the Trustee for his reasonable fees and expenses incurred in taking those actions, as a condition precedent to allowance of this claim.

THEREFORE, THE FOLLOWING IS ORDERED:

Hoeschst Celanese Corporation is allowed a timely filed general unsecured claim in the current case in the amount of \$77,927.68. Accordingly, Hoeschst will share pro rata in any distribution to the class of general unsecured creditors in the case. However, Hoechst's failure to properly file it's formal proof of claim in a timely manner resulted in additional expenses being incurred by the Chapter 7 Trustee. Therefore, Hoechst is ordered to reimburse the Trustee for his reasonable fees and expenses incurred as a result of his justified filing of the objection to it's claim. If the parties cannot agree on a reasonable amount, the Court will set a further hearing in the matter to determine that amount.

This is the \_\_\_\_\_ day of May, 1996.

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United States Bankruptcy Judge